STATE OF MICHIGAN
IN THE SUPREME COURT

GEORGE BADEEN, an individual and on behalf of a proposed class and MIDWEST RECOVERY AND ADJUSTMENT, INC, a Michigan for profit Corp and on behalf of a proposed class,

Plaintiffs-Appellants,

v

PAR, INC, d/b/a, PAR NORTH AMERICA, an Indiana corporation, REMARKETING SOLUTIONS, a Delaware limited liability company; CENTERONE FINANCIAL SERVICES LLC, a Delaware corporation; FIRST NATIONAL REPOSSESSORS, INC a Minnesota corporation; MILLENNIUM CAPITAL AND RECOVERY CORPORATION, an Ohio corporation; RENOVO SERVICES, LLC, a Delaware limited liability company, RENAISSANCE RECOVERY SOLUTIONS, INC, a Nevada corporation; ASR NATIONWIDE, LLC, a Florida limited liability corporation; THE M. DAVIS COMPANY, INC d/b/a USA RECOVERY SOLUTIONS, a California Corporation; REPOSSESSORS, INC, a Minnesota corporation; AMERICAN RECOVERY SERVICES, INC, a California corporation; DIVERSIFIED VEHICLE SERVICES, INC, an Indiana corporation; NATIONAL ASSET RECOVERY CORP, a Florida corporation; CONSUMER FINANCIAL SERVICES, LLC, a Connecticut limited liability company, TD AUTO FINANCE, LLC, a Michigan limited liability company, TOYOTA MOTOR CREDIT CORPORATION, a California corporation; NISSAN MOTOR ACCEPTANCE CORPORATION, a California corporation; SANTANDER CONSUMER USA INC, an Illinois corporation; PNC BANK, an Ohio corporation; BANK OF AMERICA, a North Carolina company; FIFTH THIRD BANK, an Ohio company, THE HUNTINGTON NATIONAL BANK, an Ohio corporation, jointly and severally,

147150

Defendants-Appellees

and

MV CONNECT, LLC d/b/a IIA, LLC, an Illinois limited liability company; GE MONEY BANK; and MANHEIM RECOVERY SOLUTIONS,

Defendants.

Supreme Court No. 147150

Court of Appeals No. 302878

Wayne County Circuit Court
No. 10-004053-CZ
Hon. Michael F. Sapala

BRIEF OF DEFENDANTS-APPELLEES PAR, INC; REMARKETING SOLUTIONS, LLC; CENTERONE FINANCIAL SERVICES LLC; MILLENIUM CAPITAL AND RECOVERY CORP; RENOVO SERVICES LLC; ASR NATIONWIDE, LLC; THE M. DAVIS CO., DIVERSIFIED VEHICLE SERVICES, INC; NATIONAL ASSET RECOVERY CORP; TD AUTO FINANCE LLC (FORMERLY CHRYSLER FINANCIAL SERVICES AMERICAS LLC); TOYOTA MOTOR CREDIT CORP; NISSAN MOTOR ACCEPTANCE CORP; SANTANDER CONSUMER, USA; PNC BANK; BANK OF AMERICA, FIFTH THIRD BANK; and THE HUNTINGTON NATIONAL BANK IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL

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COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Does Michigan's Occupational Code require "forwarders" to be licensed as "collection agencies" to merely manage the hiring of licensed repossession agents for lenders?

Plaintiffs-Appellants say "Yes."

Defendants-Appellees say "No."

The trial court said "No."

The Court of Appeals said "No."

INTRODUCTION

Plaintiff-Appellant George Badeen ("Badeen") and his firm, Midwest Recovery and Adjustment, Inc. ("Midwest Recovery") (collectively "Badeen") initiated this action seeking a declaration that it is unlawful for the Lender Defendants to delegate to a forwarder an otherwise administrative task that the Lender would perform in-house – the hiring of licensed debt collectors. Badeen's argument boils down to the contention that anyone who hires a licensed collection agency on behalf of a financial institution is itself a "collection agency." This argument is as illogical as it is self-serving, and no further review by this court is necessary to confirm what is obvious from the statute's plain text: nothing in the Occupational Code or the Regulation of Collection Practices Act ("RCPA") requires that either the Lender Defendants or Forwarder Defendants be licensed as "collection agencies" merely to hire those who are.

At the outset, Badeen's application should be denied for failure to satisfy, or even attempt to satisfy, any of the grounds warranting this Court's review set forth in MCR 7.302(B). there is no suggestion that the Court of Appeals opinion raises jurisprudentially significant issues (it clearly does not), or that it conflicts with any prior case law. Because none of the MCR 7.302(B) grounds is met, leave should be denies on this basis alone.

On the merits, even assuming the Lender Defendants are "regulated persons" whose conduct is governed by the RCPA, it does not follow, as Badeen contends, that they must deal only with licensed "collection agencies" during every stage of the debt collection process. Neither the Occupational Code nor the RCPA reveals an intention to create so empty a rule that serves no purpose other than to guard the profit margins of disgruntled repossession agents like Badeen. It would be illogical to impose liability on the Defendants, as Badeen urged below, simply because Lenders delegated a contracting function to Forwarders that the Lenders previously performed in-house without any obligation to obtain a license. Because the Court of

Appeals correctly concluded that the Occupational Code does not require Forwarders to be licensed to hire licensed repossession agents for Lenders, this Court should deny leave to appeal.

This Court should alternatively deny leave because the issue raised in Badeen's application is completely unnecessary to the resolution of his claims. The Occupational Code expressly exempts "interstate communications" from its licensing requirements. Badeen alleges that the Forwarder Defendants are all located outside Michigan and merely retain licensed collection agents in Michigan for Lenders. Badeen has alleged nothing more than "interstate communications" between the Forwarder Defendants and licensed agencies. Should the court wish to take other action besides denying leave to appeal, it should be to affirm the Court of Appeals on this alternative ground for dismissal.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

I. Facts Alleged.

Badeen's Statement of Facts is argumentative and unsupported by record citations, in violation of MCR 7.212(C)(6) and MCR 7.302(A)(1)(d). The former requires that a statement of facts be "fairly stated without argument or bias," and contain "specific page references to the transcript, the pleadings, or other document or filed with the trial court." Defendants-Appellees therefore provide the following counter-statement of the facts as actually alleged.

Badeen's Complaint dated April 5, 2010, First Amended Complaint dated May 6, 2010, and Second Amended Complaint ("SAC") dated September 7, 2010, are identical in all material respects.[1] The facts as alleged by Badeen are as follows. Badeen, a Michigan licensed collection agency manager, is the owner of Midwest Recovery, which is located in Redford

[1] The First Amended Complaint made some minor changes in the descriptions of certain defendants. The SAC added Midwest Recovery as a plaintiff, and counts under the Occupational Code and Regulation of Collection Practices Act, based on identical factual allegations.

Township, Michigan. (See SAC ¶¶ 1, 2). Midwest Recovery is an automobile repossession agency that is hired by automobile creditors to repossess the financed vehicles. (*Id.* ¶ 34).

Formerly, when a creditor – like the Lender Defendants – needed to engage the services of a repossession agent to repossess automobile collateral, it would directly contact, negotiate with, and retain a repossession agent in the area where the car was located. (See SAC ¶ 34). More recently, however, creditors have outsourced the process of identifying and retaining appropriate repossession agents to forwarders – like the Forwarder Defendants – who retain repossession agents to repossess automobile collateral for lenders, but forwarders do not themselves repossess collateral or contact debtors to collect debts. (See SAC ¶¶ 3, 35-40). The "Forwarder Defendants" are PAR, Inc. d/b/a PAR North America; Remarketing Solutions, LLC; Center One Financial Services LLC; Millennium Capital and Recovery Corporation, LLC d/b/a IIA, LLC; ASR Nationwide, LLC, National Asset Recovery Corp; Renovo Services, LLC; and Diversified Vehicle Services, Inc.

Badeen alleges that the Lender Defendants[2] provide consumer automobile financing in Michigan and had business relationships with some of the proposed class members at some point in time. (*Id.* ¶¶ 19-27, 32). The "Lender Defendants" in this lawsuit are TD Auto Finance LLC f/k/a Chrysler Financial; PNC Bank, N.A.; Bank of America; Toyota Motor Credit Corporation; Fifth Third Bank; The Huntington National Bank; Nissan Motor Acceptance Corporation and Santander Consumer USA, Inc.

Most of the Forwarder Defendants provide forwarding service on a nationwide basis. (See SAC ¶¶ 18, 35 ("Defendant Forwarding Companies are large scale organizations doing

[2] For convenience, various banks and finance companies are referred to herein as "lenders" or the "Lender Defendants." The non-bank finance companies (such as Nissan Motor Acceptance Corporation), however, generally do not make loans to consumers but instead purchase installment contracts or leases and receive an assignment from the dealer. Thus, these non-bank finance companies are creditors by assignment, but they are not lenders.

business on a national level")). Thus, a creditor that needs cars repossessed in several states can make one call to a forwarder, who will retain repossession agents in the several states. In Michigan, where repossession agents must be licensed by the state, forwarders retain state-licensed repossession agencies. (See *id.* ¶ 40 ("Defendant Forwarding Companies then hire local, licensed Michigan debt collectors to repossess the collateral sought to be seized")). The forwarders have negotiated favorable rates from repossession agents. This reduces costs for the creditors and debtors who pay for those services, but allegedly injures the members of the proposed class by reducing their profits. (See *id.* ¶¶ 40, 52).

II. Proceedings.

The Complaint, the First Amended Complaint, and the SAC, identically seek relief on behalf of Badeen and a proposed class consisting of all automobile repossession agencies and their owners who were licensed by the State of Michigan as collection agencies during the last six years. (See Count I). Badeen asserts that the Forwarder Defendants have violated the Michigan Occupational Code, MCL 339.101 *et seq.* ("Occupational Code"), by performing collection activities in the State of Michigan without a collection agency license, and that the Lender Defendants have violated the Regulation of Collection Practices Act ("RCPA"), MCL 445.251 *et seq.*, by hiring unlicensed forwarders, injuring Badeen and the other class members. (*See* SAC Count II). Based on the same allegations, Badeen also pleads that the Forwarder Defendants conspired with the Lender Defendants to violate the Occupational Code (see *id.* Count III), and interfered with business relationships between proposed class members and the Lenders (see *id.* Counts IV, V).

In an Opinion and Order dated February 16, 2011 (Apx. 1), the trial court granted all Defendants' motions for summary disposition pursuant to MCR 2.116(C)(8), holding that each

count of the SAC fails to state a claim on which relief can be granted for the reason that the Forwarder Defendants are not "collection agenc[ies]" as defined in MCL 339.901(b).

The Court of Appeals affirmed in a published opinion dated April 11, 2013 (Apx. 2). On May 29, 2013, the Court of Appeals issued an order correcting certain language in the opinion without altering the result (Apx. 3).

ARGUMENT

I. THE COURT SHOULD DENY LEAVE TO APPEAL BECAUSE THE COURT OF APPEALS CORRECTLY HELD THAT FORWARDERS ARE NOT "COLLECTION AGENCIES."

The Court of Appeals correctly resolved the issue of statutory interpretation presented in Badeen's application, and this Court need not revisit it. Article 6 of the Occupational Code provides that a person shall not engage in an occupation regulated by the Act unless the person is licensed. MCL 339.601(1). The RCPA provides that a regulated person must not hire a person required to be licensed under Article 9 of the Occupational Code. Article 9 provides for the licensing of "collection agencies." A "collection agency" is defined in MCL 339.901(b) as:

> a person directly or indirectly engaged in soliciting a claim for collection or collecting or attempting to collect a claim owed or due or asserted to be owed or due another, or repossessing or attempting to repossess a thing of value owed or due or asserted to be owed or due another arising out of an expressed or implied agreement. . . .

Badeen contends that Forwarder Defendants are "soliciting a claim for collection" and are "indirectly . . . repossessing or attempting to repossess a thing of value owed or due or asserted to be owed or due another" when they allegedly seek collection work from Lender Defendants and forward it to licensed collection agencies. Badeen's interpretation defies the plain language of the statute and the rules of statutory construction.

A. Standard of Review.

Statutory interpretation is a question of law that is reviewed de novo on appeal. *Eggleston v Bio–Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003). Likewise, this Court reviews de novo a trial court's decision on a motion for summary disposition. *Koenig v South Haven*, 460 Mich 667, 674; 597 NW2d 99 (1999). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a complaint by the pleadings alone. *Haynes v Neshewat*, 477 Mich 29, 34; 729 NW2d 488 (2007). A motion under MCR 2.116(C)(8) is properly granted where the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery. *Haynes v Neshewat*, supra, 477 Mich at 34.

In his Statement of the Facts and throughout his application, Badeen improperly makes conclusory factual assertions with no citation to anything in the pleadings. This Court should disregard those unpleaded assertions as irrelevant to a motion under MCR 2.116(C)(8).

The primary task of statutory construction "is to discern and give effect to the intent of the Legislature." *Shinholster v Annapolis Hosp,* 471 Mich 540, 548-49; 685 NW2d 275 (2004). "The overarching rule of statutory construction is 'that this Court must enforce clear and unambiguous statutory provisions as written.'" *United States Fidelity Ins & Guaranty Co v Michigan Catastrophic Claims Ass'n*, 484 Mich 1, 12; 795 NW2d 101 (2009), quoting *In re Certified Question (Preferred Risk Mut Ins Co v Michigan Catastrophic Claims Ass'n)*, 433 Mich 710, 721; 449 NW2d 660 (1989). This Court interprets the words "in light of their ordinary meaning and context within the statute and read[s] them harmoniously to give effect to the statute as a whole." *People v Peltola*, 489 Mich 174, 181; 803 NW2d 140 (2011). Thus, the Court is "required to interpret statutes in their entirety in the most reasonable manner possible." *Duffy v Michigan Dept. of Natural Resources*, 490 Mich 198, 215 n 7; 805 NW2d 399 (2011).

B. The Plain Language of the Occupational Code Limits the Definition of "Collection Agency" to Persons who (1) Directly or Indirectly Contact Consumer Debtors to Collect Debts or Attempt to Collect by Other Means, or (2) Repossess Collateral Securing Consumer Debts.

As the Court of Appeals properly concluded, the language of MCL 339.901(b) is unambiguous. The Forwarder Defendants do not "solicit[] a claim for collection" within the meaning of MCL 339.901(b). "Claim" is defined by the Occupational Code. "[C]laim" means the same thing as "debt." It is "an obligation or alleged obligation for the payment of money." MCL 339.901(a). The Lender Defendants have a "right" to payment, not an obligation. It is the debtors who have obligations to pay. Thus, "soliciting a claim for collection" means contacting a debtor with "an obligation or alleged obligation to pay" for the purpose of collection – which, as the pleadings concede, the Forwarder Defendants do not do.[3] See COA Op., p. 7 (Apx. 2).

Nor, as the Court of Appeals correctly concluded, are the Forwarder Defendants "indirectly engaged in . . . repossessing or attempting to repossess" collateral:

> Thus, the issue boils down to whether the forwarder defendants "directly or indirectly engaged in repossessing or attempting to repossess" collateral. We conclude that they did not. "Engage" means "to occupy the attention or efforts of; involve." Random House Webster's College Dictionary (1997). And "occupy" is defined as "to fill up, employ, or engage." *Id.* Plaintiffs' complaint alleges that the forwarder defendants hired and contracted with "local, licensed, Michigan debt collection agencies to repossess the collateral sought to be seized." However, the fact that the forwarder defendants contracted out the work demonstrates that they were not "occupied" or "involved" with the act of repossession itself. There were no allegations that the forwarding defendants had any involvement or input whatsoever with the actual repossession effort process, and we decline to find that a forwarder who contracts out the actual repossession process is "indirectly engaged in repossessing or attempting to repossess." Such an extension of the process would be too attenuated.

Id. at 7-8.

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[3] "Solicit" means: "1.) To seek to obtain by persuasion, entreaty, or formal application, 2.) To petition persistently; importune." American Heritage® Dictionary of the English Language (4th ed. 2000). "Collect" means, among other things, "to call for and obtain payment of, to take in payments or donations." *Id.* "Collection" means, among other things, "a collecting of money, as in church" and "the sum so collected." *Id.*

Finally, the Court of Appeals concluded that its construction of the definition is consistent with the purposes of the Occupational Code:

> Our construction of the phrase "indirectly engaged in repossessing or attempting to repossess" is consistent with the purpose of the statute "to protect the debtor and the creditor from the potentially improper acts of a third-party collection agency." *Asset Acceptance Corp v Robinson*, 244 Mich App 728, 732; 625 NW2d 804 (2001). Because forwarders are not involved with "collection activities" (they do not collect debts, they do not contact consumers, and they are not involved with the actual act of repossession), requiring them to be licensed would not further the purpose of the statute.

Id. at 8.

Examination of the balance of the Occupational Code confirms the Court of Appeals' conclusion that the statute has no application to forwarders because "they do not collect debts, they do not contact customers, and they are not involved with the actual act of repossession." *Id.* Virtually all of the activities described in Article 9 of the Occupational Code involve direct or indirect ***contact with debtors*** – either to ask the debtor to repay a debt, to actually collect money from the debtor, or to repossess collateral from the debtor. Nothing in the definition mentions a service that simply refers creditors to licensed collection agents. Nor do the substantive requirements of the Code logically apply to such a service:

- MCL 339.909 requires a collection agency to maintain a separate trust account in which money collected from debtors is deposited.
- MCL 339.910 requires a collection agency to maintain detailed books and records showing the funds received and disbursed.
- MCL 339.915 prohibits a licensee from deceiving or making inaccurate representations to a debtor, communicating with a debtor known to be represented by an attorney, contacting the debtor's employer without authorization, or threatening or harassing a debtor.
- MCL 339.915a prohibits conduct that could imply to a debtor that the collection agent is an attorney, commingling of funds collected with the collection agency's funds, and use of names other than the one appearing on the license.
- MCL 339.918 establishes procedures by which the debtor can contest the validity or amount of the debt.

These provisions are intended "to protect the debtor and the creditor from the potentially improper acts of a third-party collection agency." *Asset Acceptance Corp v Robinson,* 244 Mich App 728, 732; 625 NW2d 804 (2001). Although the trust account and books and records provisions arguably benefit creditors, as well as debtors, see MCL 339.909 and MCL 339.910, those provisions apply only *after* monies are collected from the debtor. None of these provisions has anything to do with the activities of forwarders.

Further evidence that Article 9 of the Occupational Code does not apply to forwarders is that it would be virtually impossible for a forwarder to obtain a Michigan collection agency license – precisely because forwarders do not contact debtors to collect debts or recover property. MCL 339.908(2) provides that a "collection agency shall not engage in the collection agency business unless each collection agency office is under the personal supervision of a licensed collection agency manager or an owner manager." MCL 339.911(b) prohibits an individual from being licensed as a collection agency manager unless he or she "[h]as had at least 6 months of full-time experience in the collection of accounts."[4]

Badeen argues that the Court of Appeals' interpretation would make the phrase "soliciting a claim for collection" mean the same thing as the phrase "collecting or attempting to collect a claim owed or due or asserted to be owed or due another," rendering the latter phrase nugatory. Badeen is mistaken. Soliciting a claim for collection means contacting the debtor himself to collect on a claim. Collecting or attempting to collect would include any other

[4] An administrative rule interprets this section as requiring proof that the applicant has 1000 hours of collection experience, "Including time spent in the actual collection of debts and property from consumers or debtors . . ." R 339.4005 (Apx. 4). Citing MCL 339.911(b), the Collection Agency Manager License Application, sec. 4, line 2a, states: "The 1,000 hours must be earned through experience which includes collection of debts and property from consumers AND through employment with a licensed collection agency or the credit or collection department of a business or financial institution engaged in collecting debts on its own behalf." See http://www.dleg.state.mi.us/bcsc/forms/coll/outstatepkt.pdf (emphasis in original) (Apx. 5).

method of collection, such as trying to garnish wages from the debtor's employer, or contacting family members to shame a debtor into paying.

Badeen contends that "soliciting a claim for collection" means contacting a ***creditor*** to seek the right to collect a claim. Application pp. 10-11. The Court of Appeals properly rejected this argument. The Occupational Code extensively regulates what a collection agent can say to a debtor, but nothing in the Code regulates what a forwarder can say to a creditor. This shows the Legislature did not intend to regulate "solicitations" by forwarders directed to creditors. Moreover, Badeen's paraphrase "[i]t is the solicitation *to the Lender* to collect claims 'owed or due to another' (the Lender) that triggers the licensing requirements under the statute," Application p. 10 (italics by Badeen) distorts the statute's language. The phrase "owed or due to another" describes the debtor's alleged obligation to pay, not the creditor's right *to collect.* "[S]oliciting . . . for collection" a "claim owed or due another" makes sense only if the solicitation is directed to the debtor. A solicitation for collection directed to a creditor would be with respect to a claim owed or due ***from*** another.

Equally unpersuasive is Badeen's assertion that forwarders must be licensed because forwarders have "interjected themselves into the collection process." See Application p. 11. Even if that characterization was accurate, Badeen fails to explain why the forwarder's interjection between the Lenders and the repossession agents triggers the licensing requirements.

Since Badeen's pleading concedes that the Forwarder Defendants are not offering to collect any debt or repossess any collateral in Michigan, the Forwarder Defendants do not need a Michigan collection agency license either to "solicit" forwarding business from Lender Defendants, or to refer the Lender Defendants to licensed repossession agents in Michigan.

C. If there is Any Ambiguity in the Definition of "Collection Agency," it is Resolved by the Principles of Statutory Construction.

1. Rules of Construction.

If there is anything ambiguous about MCL 339.901(B), settled rules of statutory construction resolve that ambiguity.

First, the definition of a "collection agency" should be narrowly construed because the Occupational Code abrogates the common law that anyone could collect debts, without limitation. Statutes "will not be extended by implication to abrogate established rules of common law," and "must be construed sensibly and in harmony with the legislative purpose." *People v Williams*, 491 Mich 164, 178 n 40; 814 NW2d 270 (2012), quoting *Rusinek v Schultz, Snyder & Steele Lumber Co*, 411 Mich 502, 507-08; 309 NW2d 163 (1981). "Where there is doubt regarding the meaning of such a statute, it is to be "given the effect which makes the least rather than the most change in the common law." *Koenig v City of South Haven*, 460 Mich 667, 677 n 3; 597 NW2d 99 (1999), quoting *Energetics, Ltd v Whitmill*, 442 Mich 38, 51; 497 NW2d 497 (1993). Applying these principles to the present case, Article 9 must be narrowly construed so that it applies only to actual debt collectors who contact debtors to collect debts or repossess collateral.

Second, the doctrine of ejusdem generis calls for the general definition of "collection agency" to be interpreted in a manner consistent with the specific activities regulated under Article 9, none of which involve the business of forwarding repossession work. "Under [the doctrine of] ejusdem generis, general terms are interpreted to include only items that are 'of the same kind, class, character, or nature as those specifically enumerated.'" *Anderson v Pine Knob Ski Resort*, Inc, 469 Mich 20, 759 n 1; 664 NW2d 756 (2003), quoting *LeRoux v Secretary of State*, 465 Mich 594, 624; 640 NW2d 849 (Kelly, J, dissenting). Under the doctrine of ejusdem generis, the phrase "directly or indirectly" cannot be read to extend Article 9 of the Occupational

Code beyond collection agencies that collect debt from consumers, to an entirely different type of business, forwarders, which simply retain repossession agents on behalf of Lenders. In *Benedict v Department of Treasury,* 236 Mich App 559; 601 NW2d 151 (1999), the Court of Appeals held that the term "and any and all other credits and evidence of indebtedness, whether secured or unsecured," was limited to commercial transactions because that was the subject of the balance of the statute. Likewise, the catch-all phrase "or indirectly" in MCL 339.901(b), appearing as part of a statute regulating the conduct of collection agencies that contact debtors to collect debts and repossess collateral, cannot be read to expand the reach of the Code to an entirely different form of business that does not collect debts or repossess collateral, but merely retains licensed collection agents on behalf of creditors.

Under the doctrine of ejusdem generis, because the activities described in Article 9 of the Occupational Code involve direct or indirect ***contact with debtors***, "directly or indirectly" does not expand the definition of "collection agency" to an entirely different type of business, i.e., forwarders. Otherwise, the reach of the statute is nearly limitless: for example, an internet service provider, a telephone company, or even the U.S. mail, are "indirectly" attempting to collect a debt when they transmit emails, calls or letters from bill collectors. Similarly, a landlady who gave a repossession agent access to premises would be "indirectly" repossessing collateral. Indeed, Mr. Badeen's ***own trade association*** operates a referral service through its web site, yet is not licensed as a collection agency. (See Apx. 6). This activity would require a license if the courts accepted Badeen's extreme view of "directly or indirectly" in the statute. Such a reading is unreasonable because the legislature could not have intended such bizarre consequences.

Finally, it is axiomatic that a statute, whenever possible, must be construed in a way that avoids constitutional infirmity. See, e.g., *People ex rel Att'y Gen v Fairfax Family Fund, Inc*, 55

Mich App 305, 311; 222 NW2d 268 (1974) ("We are obligated to construe a statute as constitutional if such a result can be reached."). Badeen's interpretation of the Occupational Code would excessively regulate conduct outside the State of Michigan, in violation of the so-called Dormant Commerce Clause, Article I, § 8, cl 3 of the US Constitution.[5]

As Badeen alleges, the Forwarder Defendants are all located outside the State of Michigan and operate nationally. See SAC ¶¶ 4-18, 35. The Forwarder Defendants' forwarding activity occurs outside the State of Michigan and has only limited and unpredictable in-state effects. The Forwarder Defendants and Lender Defendants do business in many states. When a forwarder "solicits" forwarding business from a lender, it does not know when, if ever, it will be called on to refer the lender to a repossession agent in Michigan. Yet Badeen contends that the Michigan Occupational Code requires the Forwarder Defendants to be licensed as collection agencies by the State of Michigan before they can solicit forwarding business from the Lender Defendants – regardless of the Lender Defendant's location – if there is any chance the Forwarder Defendant may eventually have to assign a Lender Defendant's account to a licensed collection agent in Michigan. Badeen's interpretation would lead to an absurdity – a collection agency in Ohio could call debtors in Michigan to collect accounts without a Michigan collection agency license, but a forwarder in Ohio could not contact a national lender in California or Minnesota to ask for forwarding business without first obtaining a Michigan collection agency license.

The US Supreme Court uses a balancing test when applying the Dormant Commerce Clause. "[T]he extent of the burden that will be tolerated will of course depend on the nature of

[5] Similarly, the courts avoid reaching constitutional issues if alternative means are available for deciding a case. See, e.g., *Stewart v Algonac Savings Bank*, 263 Mich 272, 284; 248 NW 619 (1933); *Rinaldi v Civil Serv Comm*, 69 Mich App 58, 69; 244 NW2d 609 (1976) ("We will not undertake a constitutional analysis when we can avoid it").

the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Pike v Bruce Church, Inc,* 397 US 137, 142 (1970). Applying this test, in *Quill Corp v North Dakota,* 504 US 298, 311-18 (1992), the Supreme Court held that a state whose residents purchased by mail from a seller that had no office in the state could not require the seller to collect use tax. Closely on point, in *Midwest Title Loans, Inc v Mills,* 593 F3d 660, 665-66 (CA7, 2010) (Posner, J), the court, following *Quill,* invalidated an Indiana statute that required a lender with no place of business in Indiana to obtain an Indiana license in order to make loans to Indiana residents. The court reached this conclusion even though the lender advertised in Indiana, recorded liens on auto titles in Indiana, and even repossessed and resold autos in Indiana. See 593 F3d at 663.[6]

2. Legislative History.

Even if Article 9 of the Occupational Code was ambiguous – which it is not – the legislative history supports Defendants' interpretation. "This Court has recognized the benefit of using legislative history when a statute is ambiguous and construction of an ambiguous provision becomes necessary." *In re Certified Question from U.S. Court of Appeals for Sixth Circuit,* 468 Mich 109, 115 n 5; 659 NW2d 597 (2003) (citations omitted). Although "not all legislative history is of equal value," *id.*, and in Michigan, "legislative analysis is a feeble indicator of legislative intent," *Frank W Lynch & Co v Flex Technologies, Inc,* 463 Mich 578, 184-85 & n 7; 624 NW2d 180 (2001), this Court nevertheless may find it relevant that the legislative analysis clearly states that the purpose of the act was to curb unfair, deceptive and harassing practices of "***bill collectors***," who contact debtors to collect debts. The Legislature originally adopted the language that is now MCL 339.901(b) in the 1974 Collection Practices Act, 1974 PA 361, MCL

[6] Badeen's reliance in the trial court on *Travelers Health Association v Virginia,* 339 US 643 (1950), was completely misplaced. *Travelers* involved jurisdiction under the Due Process clause, and did not address the Commerce Clause at all.

445.211 *et seq.* The legislative analysis of the 1974 Act confirms that its purpose was to curb improper practices of "bill collectors," whether collection agencies or in-house collection departments:

> Some persons believe ***bill collecting practices*** and methods utilized by collection agencies should be regulated much more closely under state law. They contend unfair, deceptive, and unethical practices of collection agencies are a major source of consumer complaints. Among alleged abuses by ***bill collectors*** . . . include: a) use of phony letterheads (i.e. those belonging to fictitious lawyers or government agencies; b) threat of garnishment with no mention of the legal process required; c) simulated court forms and telegrams; d) impersonation or fraudulent representation of government personnel; e) requesting a person's employer for assistance in collection of a debt; f) distribution of poor credit ratings; and g) harassing techniques such as physical threats, constant phone calls, or efforts to humiliate a debtor in front of his friends and neighbors. . . .

House of Representatives Analysis of SB 439, dated July 23, 1974 (emphasis added) (Apx 7). These prohibitions were incorporated into the original Collection Practices Act, and later carried over to the Occupational Code (which regulated collection agencies) and the current Regulation of Collection Practices Act, MCL 445.251 *et seq.* (which regulates all bill collectors, including in-house collection departments). All of these laws prohibit improper conduct by people who contact debtors to collect a debt. None of them has anything to do with the activities of forwarders.

The Attorney General used similar language to explain that the original Collection Practices Act was intended to regulate collection agencies and in-house collection departments:

> Argument for the bill: Much evidence exists in the files of the Attorney General, Consumer Protection Division, of the use of various practices that are unconscionable, unfair or deceptive in the collection of debts from Michigan consumers. Numerous complaints have been received of simulated legal process, the use of phony letterheads, deceptive use of the words "legal department" in collection letters and use of threat to employment. * * * Current Michigan law is principally designed to protect the creditor in his relationship with the collection agency. No current protection exists on a uniform basis for the citizens of the state against abuses arising from unfair and deceptive collection practices as outlined above. This bill would also reach licensed collection agencies and those that engage in a collection practice as an in-house function of a company, as well

as others who might engage in periodic collection practices where a license is not required.

Attorney General's Memorandum re: Senate Bill No. 439, dated May 14, 1973 (Apx. 8). The legislative history thus demonstrates that Article 9 of the Occupational Code was intended to regulate the conduct of bill collectors, not forwarders who simply retain repossession agents on behalf of creditors. Indeed, the Legislature could not possibly have been addressing forwarders, which did not come into existence until many years later. Although the statute has been readopted, it has ***never*** been amended to cover forwarders or regulate what a forwarder can say to a creditor when it asks for business.

3. Other Laws Covering Similar Subjects.

Consideration of other laws covering related subjects can also be an aid in construing amibiguous statutes. See, e.g., *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998). Badeen cites a rule of professional responsibility, MRPC 7.3a (which of course is not a law), to support the proposition that "solicit" must mean "asking for work." Application pp. 11. But that Rule uses the express language "solicit professional employment." The presence of the word "employment" as the object of the verb "solicit" confirms that one might "solicit" any number of things besides employment. Other laws show that "solicit" can mean many things, depending upon the context. For example, in the criminal statute outlawing "solicitation of murder or other felony," "solicit" does not mean "asking for work," but the opposite, *i.e.*, asking someone else to work for you by committing a felony. MCL 750.157b. When it intended to address the act of soliciting a ***lender*** to perform collection activities, the Michigan Legislature did so clearly: MCL 339.915a(f) prohibits a licensed collection agency from "[s]oliciting, purchasing, or receiving an assignment of a claim for the sole purpose of instituting an action on the claim in a court."

D. Badeen's Unpleaded Factual Assertions Do Not Change the Result.

Badeen seeks to rely on two Forwarder Defendant web sites, several letters, and Badeen's speculation that the Forwarder Defendants may have a role in reselling collateral after it is repossessed. See Application p. 12 and Exhibits 3-6 thereto. Badeen fails to cite to any pleading for these "facts," because none of this is contained in any pleading, as required by MCR 2.116(C)(8). Even if these unpleaded matters are considered, as a matter of law, they do not support Badeen's contention that the Forwarder Defendants must be licensed in Michigan, and the Court of Appeals properly affirmed summary disposition for Defendants.

Badeen cites the web pages (Application, p. 11 & Exhibit 3) in support of his assertion that the Forwarder Defendants are engaged in repossession activities by reselling, transporting or re-titling collateral after it has been repossessed. But reselling, transporting or re-titling collateral is ***not*** part of the repossession process as a matter of law. "Once a repossession agent has gained sufficient dominion over collateral to control it, the repossession has been completed." *James v Ford Motor Credit Co*, 842 F Supp 1202, 1209 (D Minn 1994). In accord is *Wallace v Chrysler Credit Corp*, 743 F Supp 1228, 1233-34 (WD Va 1990).[7]

Badeen also cites a January 12, 2010 letter from a DELEG employee (Application, p. 11 & Exhibit 5). This is a form letter that, if entitled to any weight at all, shows that DELEG found no violation. The letter apparently responds to a complaint from Badeen, who is a member of the Collection Practices Board, which operates under DELEG. See http://www.michigan.gov/dleg/0,1607,7-154-35299_35414_35458-114304--,00.html (last accessed Dec. 7, 2010, attached as Apx. 11). Without finding any facts or even describing

[7] Moreover, the Forwarder Defendants' web pages are interstate communications exempt from the Occupational Code by MCL 339.904(2). See pp. 21-22, below. Also see *Cyberspace Communications, Inc v Engler*, 55 F Supp 2d 737, 751 (ED Mich 1999) (Tarnow, J.) (Michigan statute purporting to regulate communication over the internet, "as a direct regulation of interstate commerce, [was] a *per se* violation of the Commerce Clause").

Badeen's allegations, the letter states that Manheim Recovery, a forwarder that is not a party before this Court, "may be engaged in the unauthorized practice of Collection Practices." But the letter then quotes MCL 339.601(2), which regulates "barber college[s], school[s] of cosmetology, or real estate school[s]," not collection agencies. The letter concludes, "The Department has closed the complaint without administrative sanctions against the respondent at this time."

This letter is not a binding determination by DELEG because it failed to comply with any of the investigative procedures required by the Occupational Code.[8] Article 5 requires DELEG, upon receipt of an administrative complaint, to investigate and open a file. See MCL 339.502, .503. DELEG can close the complaint file ***only*** if it finds no evidence of a violation. If DELEG finds evidence of a violation, it ***must*** conduct further proceedings and cannot close its file until they are completed.[9] Since DELEG closed its file, it must be deemed that it found ***no*** violation. Alternatively, DELEG concluded that Badeen's complaint had merit, but ignored completely its

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[8] Failure to be licensed as required by MCL 339.601(1) can be prosecuted as a misdemeanor. *See* MCL 339.601(4). In the alternative, DELEG can bring an administrative proceeding under Article 5 of the Occupational Code, MCL 339.501 *et seq*. *See* MCL 339.601(12).

[9] MCL 339.504 provides in relevant part:

> (1) The investigative unit of the department, within 30 days after the department receives the complaint, shall report to the director on the status of the investigation. . . .
>
> (2) If the report of the investigative unit of the department does not disclose a violation of this act or a rule promulgated or an order issued under this act, the complaint shall be closed by the department. The reasons for closing the complaint shall be forwarded to the respondent and complainant, who then may provide additional information to reopen the complaint.
>
> (3) If the report of the investigative unit made pursuant to subsection (1) discloses evidence of a violation of this act or a rule promulgated or an order issued under this act, the department or the department of attorney general shall prepare the appropriate action against the respondent which may be any of the following:
>
> (a) A formal complaint.
>
> (b) A cease and desist order.
>
> (c) A notice of summary suspension.
>
> (d) A citation.

own statutory procedures and denied Manheim due process. In the latter event, the letter is non-binding as a matter of adjudication and inadmissible as hearsay.

The letter from counsel for Forwarder Defendant Millenium Capital (Application, Exhibit 6), simply confirms that Millennium does not itself repossess collateral in Michigan but deals through interstate communications (exempt under MCL 339.904(2) as discussed below) with state-licensed repossession agents.[10]

II. ALTERNATIVELY, THIS COURT SHOULD PEREMPTORILY AFFIRM THE COURT OF APPEALS ON THE BASIS THAT THE ALLEGED CONDUCT IS "INTERSTATE COMMUNICATION."

Defendants raised an additional ground for summary disposition, but neither the trial court nor the Court of Appeals found it necessary to reach it. See Tr. Ct. Op. Feb. 17, 2011, p. 4 (Apx. 1). MCL 339.904(2) provides that a "person is not subject to the licensing requirement of subsection (1) if the person's collection activities in this state are limited to interstate communications." Even assuming (incorrectly) that a forwarder somehow "indirectly" attempts to collect a debt, the Forwarder Defendants' conduct is exempt from the Occupational Code because it is "limited to interstate communications" under MCL 339.904(2). Badeen alleges that the Forwarder Defendants are all located outside Michigan, and simply retain collection agents in Michigan who are licensed by the State. (See SAC ¶¶ 4-18, 35, 40). Badeen has not alleged that the Forwarder Defendants have engaged in any conduct other than interstate communications. Thus, the Forwarder Defendants are expressly exempt from the licensing requirement of the Occupational Code.

The legislature added the "interstate communications" language in 1994 P.A. 143, responding to a national campaign by the American Collectors Association, which represents

[10] Badeen also attaches, but does not cite, a letter from a Lender Defendant to Appellant Midwest Recovery (Application, Exhibit 4). This letter simply advises Badeen that all new repossession assignments will be directed to a forwarder. It adds nothing to the allegations of the SAC.

collection agencies throughout the nation. The legislative history reflects an intent to promote interstate commerce by allowing out-of-state collection agencies to contact debtors in Michigan:

> Larger collection agencies are usually willing and able to meet these licensing requirements, not only to pursue debtor clients here, but also to solicit new business in the State. Small out-of-state collection agencies, however, who want to pursue debtors who move here from other states often must either write these debts off or assume the financial burden of paying the license fee and obtaining the necessary bond simply to contact the debtor residing in Michigan by phone, fax, or mail.

Senate Fiscal Agency Bill Analysis, HB 5022, May 3, 1994 (emphasis in original) (Apx. 12). For instance, in *Cadle Company II, Inc v Wechsler*, No. 269833, 2006 WL 2959698 (Mich Ct App, Oct 17, 2006) (Apx. 13), the court held that defendant engaged in "interstate communications" exempt from the Occupational Code when it sent letters into Michigan attempting to collect a debt. Not applying this exemption to the Forwarder Defendants would lead to an absurd result, where an unlicensed collections agency in Ohio could directly contact a debtor in Michigan for the purpose of collection, but an unlicensed out-of-state Forwarder Defendant could not hire a licensed collections agency in Michigan to contact that same debtor.

This ground independently requires dismissal of the Complaint, providing yet another reason why further review of the statutory interpretation issue presented in Badeen's application is unnecessary. See, e.g., *Welch v Dist Court*, 215 Mich App 253, 256; 545 NW2d 15 (1996).

CONCLUSION AND RELIEF REQUESTED

Plaintiffs' goal is to force the Lender Defendants to deal directly with Plaintiffs when repossessing vehicles in Michigan and to recover Plaintiffs' alleged lost "market rate" profits when the Lender Defendants delegated to the Forwarder Defendants the administrative task of hiring licensed repossession agents in Michigan. The Occupational Code and the RCPA were never intended to protect repossession agents (such as Plaintiffs) and their profit margins, or to insulate them from competition by other repossession agents. While Plaintiffs are unhappy with

the Lender Defendants' decisions to hire forwarding companies, the practice is lawful, and consumer debtors in Michigan and elsewhere are simply not harmed by this change in the automobile repossession industry.

For the reasons set forth herein, this Court should deny the application for leave to appeal or, as a lesser alternative, peremptorily affirm on the alternative grounds briefed above. This Court should further award Appellees their costs and attorney fees on appeal.

Respectfully submitted,

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